No. 85-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, Secretary of Health and Human Services,

Petitioner,

—v.—

JANET J. YUCKERT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN DIABETES ASSOCIATION, EPILEPSY FOUNDATION OF AMERICA, LUPUS FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL MULTIPLE SCLEROSIS SOCIETY, SAVE OUR SECURITY, ALLIANCE OF SOCIAL SECURITY DISABILITY RECIPIENTS AND PLAINTIFF CLASS MEMBERS OF *BAILEY* v. *BOWEN*, *DIXON* v. *BOWEN*, *JOHNSON* v. *BOWEN*, *McDONALD* v. *BOWEN* AND *WILSON* v. *BOWEN*.

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INTERESTS OF AMICI CURIAE

Amici are organizations representing disabled persons and plaintiff class members of certified class actions challenging application of the "severity" regulation that is at issue in this case. Because amici represent disabled persons who have been illegally denied benefits under the Secretary's severity regulation, they have a clear interest in ensuring that this Court is presented with a full picture of the Secretary's use of the severity regulation to deny benefits to eligible claimants.

1. Amici Organizations

The American Diabetes Association ("ADA") is a non-profit organization that has over 800 affiliates and chapters nationwide and more than 220,000 members, including lay persons, physicians, research scientists, nurses, dietitians, and educators. The purpose of the ADA is to promote research relating to curing and preventing diabetes, and to improve the well-being of people with diabetes and their families. The disease often leads to serious complications, including blindness, heart disease, kidney failure, and circulatory problems leading to amputations. Even in the early stages of development, diabetes and/or these complications can prevent persons with diabetes from performing substantial gainful work. The case history of the amputee with diabetes whose disability was termed not severe, described more fully at page 13 *infra*, is representative of the illegal and unjustifiable results which the Secretary's practices under the severity regulation impose upon the ADA membership and others.

The National Multiple Sclerosis Society ("NMSS") is a non-profit organization which is comprised of 105 chapters with over six hundred thousand members nationwide. Since it was organized in 1946, NMSS has been dedicated to promoting the cure, treatment and prevention of multiple sclerosis ("MS") and to improving the quality of life and enhancing independence for persons with MS. MS is a highly unpredictable and variable neurological disease that often produces serious functional impairment. The variable course of the disease requires a careful evaluation of both vocational factors and medical evidence in assessing the extent to which people with MS are incapable of performing substantial gainful work.

The Epilepsy Foundation of America is a non-profit corporation founded in 1968 to advance the interest of the over 2 million Americans with epilepsy through research, vocational programs, public information and education, professional awareness, and advocacy. The Epilepsy Foundation of America has a long-standing interest and commitment to secure the legal rights of persons with disabilities.

The Lupus Foundation of America is a private non-profit organization comprised of over 22,000 members. The Foundation was created in order to improve the standard of care and treatment of those individuals who suffer from lupus erythematosus. Lupus erythematosus is a disease of the immune system that often affects the kidney, brain, lungs, joints, and/or skin. One of the major goals of the Lupus Foundation of America is to work for the provision of programs and services that will directly improve the quality of life of all those who have the disease.

The National Mental Health Association is the nation's largest private, voluntary organization providing leadership to confront the entire range of issues impacting mental disorders and mental health at the local, state, and national level. Membership includes concerned citizens, current and former consumers of mental health services, family members whose loved ones suffer from mental illnesses, and mental health professionals. The Association strives to make mental health a major national priority.

The National Alliance for the Mentally Ill is a self-help organization of families of mentally ill persons, of mentally ill persons themselves, and of friends. Composed of more than 650 local and state Alliances for the Mentally Ill all across the country, totaling nearly 40,000 members, its goals are mutual

support, education and advocacy for the victims of mental illness, especially schizophrenia and manic and other disabling depressions.

Save Our Security ("S.O.S.") is a national advocacy coalition comprised of concerned individuals and over 100 organizations. It works to safeguard all aspects of Old Age, Survivors' and Disability Insurance, Medicare, Medicaid and Supplemental Security Income. In recent years, S.O.S. and its membership have worked to assure the fairness and accuracy of the Social Security and SSI disability evaluation process.

The Alliance of Social Security Disability Recipients is an organization founded to serve disability applicants and recipients. The Alliance was formed by disability recipients, their family members and concerned citizens in response to the recent illegal denials and terminations of benefits to disabled Americans by the Social Security Administration. At this time, the Alliance has approximately 3,000 members in eighteen states.

All of the amici organizations believe that the Secretary has unlawfully employed the severity regulation to deny disability benefits to eligible claimants. In addition, many members of these organizations have been directly affected by the Secretary's practices because they have been denied benefits to which they are entitled under the Social Security Act.

2. Amici Plaintiff Class Members

The plaintiff class members in *Bailey*, *Dixon*, *Johnson*, *McDonald*, and *Wilson*,[1] are persons who have been denied or terminated from disability benefits because the Secretary classi-

1 *See Bailey* v. *Heckler*, No. 83-1797 (M.D. Pa. Dec. 3, 1985), *mod.*, Mar. 11, 1986, *appeal pending* 86-5038 & 86-5157 (3d. Cir.) (Pennsylvania, Delaware, Maryland, Virginia, West Virginia); *Dixon* v. *Heckler*, 589 F.Supp. 1494 (S.D.N.Y. 1984), *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2) (New York); *Johnson* v. *Heckler*, 593 F.Supp. 375 (D. Ill. 1984), *aff'd*, 769 F.2d 1202 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3600 (Mar. 11, 1986) (No. 85-1442) (Illinois); *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d 1118 (1st Cir. 1986) (Massachusetts); *Wilson* v. *Heckler*, 622 F.Supp. 649 (D.N.J. 1985), *aff'd*, 796 F.2d 36 (3d Cir. 1986) (New Jersey).

fied their impairments as not severe. As is set forth more fully below, these class members have been summarily denied disability benefits even though a substantial percentage of them are in fact disabled and could prove their eligibility for benefits if the Secretary would evaluate their disabilities in light of both medical and vocational considerations. The plaintiff class members have an unmistakable interest in the outcome of this case since the Secretary has argued on appeal that the preliminary and permanent injunctions in their cases should be reversed or vacated in light of this Court's decision in respondent's individual challenge to the severity regulation.

In addition to their interest in this case, amici are in an unusual position to present this Court with the available evidence on the Secretary's actual implementation of the severity regulation, as reflected in his instructions to staff, quality assurance directives, statistical evidence and the arguments he has made to various courts. This evidence, while extensive, is not complete since in some cases amici class members are still in the early stages of discovery. It is nonetheless highly relevant to an appraisal of the Secretary's description of his practices to this Court.

The available evidence shows that the Secretary's position in this Court is disingenuous. His representations on the intent and effect of the challenged regulation are betrayed by the way the Social Security Administration ("SSA") actually applied the regulation and by the Secretary's own prior representations to the courts of appeals. Furthermore, the Secretary improperly relies on a newly issued ruling—which was not applied to the respondent and whose general application has not been evaluated in a factual setting by any district court—to legitimize a regulation that the Secretary consistently employed to deny benefits to eligible claimants.

SUMMARY OF ARGUMENT

In his brief to this Court, the Secretary blurs the distinction between a legitimate *de minimis* severity step to screen out frivolous claims and a severity step regulation that operates to deny benefits to eligible claimants. At the same time, the Secretary assures the Court that he has consistently implemented the severity regulation as a *de minimis* standard.

The Secretary's description of the severity regulation squarely conflicts with the language of the regulation, the Secretary's instructions to his staff, all of the available statistical evidence, and with the Secretary's own representations to other courts. Although the Secretary acknowledges that the regulation may have been too "strictly applied" (Pet. Br. 10) and urges that a recent ruling will prospectively ensure a *de minimis* application of the regulation, he has neither amended the severity regulation nor informed his staff that his past instructions were wrong.

Because the Secretary has not altered his regulation and because that regulation was interpreted and implemented in a manner inconsistent with the Social Security Act, amici urge this Court to affirm the judgment below. Such a ruling will leave the Secretary free to promulgate new regulations setting forth an appropriate *de minimis* standard for screening out groundless claims. Even if this Court should conclude, however, that the severity regulation may now be construed narrowly as a *de minimis* screening mechanism, it should follow those courts that have adopted this reading of the regulation and remand respondent's case for a new evaluation under that narrow construction.

ARGUMENT

I.

The Social Security Act Does Not Permit A Severity Step That Operates As More Than A *De Minimis* Screening Mechanism

By its terms, the Social Security Act requires that the severity of a medically determinable impairment be evaluated in light of the claimant's ability to return to past work or to perform other substantial gainful activity in light of that claimant's age, education, and work experience. 42 U.S.C. § 423(d)(2)(A).[2] All twelve courts of appeals have interpreted this language to mean that a claimant presents a *prima facie* case of disability by demonstrating that he is precluded from returning to his past work by reason of a medically determinable impairment. *See Johnson* v. *Heckler*, 769 F.2d at 1210 (citing cases).[3] Once a claimant demonstrates an inability to return to past work, the burden shifts to the Secretary to show other work that the claimant can perform in light of his age, education, and work experience. Such alternative work experience may be established through the Medical Vocational Guidelines, which take administrative notice of the number of jobs available to persons with designated medical and vocational profiles. *See*

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2 Even prior to the incorporation of these considerations into the statutory standard of disability, they were reflected in the Secretary's own regulations. *See* 20 C.F.R. § 404.1501(d) (1957); 25 Fed. Reg. 8100 (Aug. 24, 1960). In addition, numerous courts had recognized that an evaluation of ability to engage in substantial gainful activity must account for vocational considerations. *See, e.g., Kerner* v. *Fleming*, 283 F.2d 916, 921 (2d Cir. 1960); *Teeter* v. *Fleming*, 270 F.2d 871, 874 (7th Cir. 1959).

3 Prior to his brief to this Court, Pet. Br. 29 n.15, the Secretary never challenged this rule in any litigation over the severity regulation. *See, e.g., Dixon* v. *Heckler*, 589 F.Supp. at 1506 ("The Secretary does not argue that this Circuit's precedents regarding the allocation of the burden of proof are incorrect. . ."). Indeed, when the term "severity" was first introduced into the Secretary's regulations, the Secretary insisted that "the burden of proof remains as established by the case law and observed by SSA." 43 Fed. Reg. 55359 (Nov. 28, 1978).

20 C.F.R. Pt. 404, Subpt. P, App. 2; *Heckler* v. *Campbell*, 461 U.S. 458 (1983).

Both the Social Security Act's definition of disability and the Secretary's own Medical Vocational Guidelines recognize that the same medical impairment affects persons with different vocational characteristics differently.[4] For example, if a person is limited to sedentary work, he will not be found disabled if he has experience with sedentary jobs or if he is sufficiently young, has sufficient education or sufficient transferable skills to adapt to new sedentary work. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 1. On the other hand, a person who remains capable of lifting as much as fifty pounds will nevertheless be found disabled under the Guidelines if he is closely approaching retirement age, has a marginal education and a history of unskilled work requiring greater exertional abilities. 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 203.01. In essence, the Guidelines "consist of a matrix of the four factors identified by Congress—physical ability, age, education and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Heckler* v. *Campbell*, 461 U.S. at 461-62 (footnotes omitted). These Guidelines show that the question whether someone is disabled by reason of an impairment can rarely be answered merely by looking at the degree of restriction caused by the impairment. Under these Guidelines, the only impairments that will never lead to a finding of disability, regardless of age, education, and work experience, are those which leave the claimant capable of engaging in heavy work and which do not impose non-exertional restrictions.

The severity regulation bypasses this evaluation of ability to return to past work or other work by concluding on the basis

4 *See generally*, Goldhammer, *The Effect of the New Vocational Guidelines on Social Security and Supplemental Security Income Disability Claims*, 32 Ad. L. Rev. 501, 502 (1982).

of medical evidence alone that an impairment is not severe.[5] Every appellate court that has considered the validity of the severity regulation has concluded that this type of denial of benefits on medical facts alone is consistent with the Act only if it is limited to screening out those impairments which are so slight that they would not be disabling regardless of the claimant's age, education and work experience.[6] Those courts which have sustained the regulation have done so only by construing it narrowly to exclude claims where the impairment is so slight that it would not affect the claimant's ability to engage in substantial gainful activity, irrespective of his age, education, and work experience. *See, e.g.*, *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d at 1125; *Salmi* v.

5 It is noteworthy that the Secretary selected a case in which the claimant is relatively young and well-educated to ask this Court to ratify a regulation that excludes consideration of vocational factors. The Secretary chose not to seek review in numerous cases in which the claimants were older, had fewer skills, and marginal educations. It is precisely those persons who are most seriously injured by the severity regulation. *See, e.g.*, *Hansen* v. *Heckler*, 783 F.2d 170, 172 (8th Cir. 1986); *Baeder* v. *Heckler*, 768 F.2d 547, 552 (3d Cir. 1985).

6 *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d at 1125; *Wilson* v. *Secretary of Health and Human Services*, 796 F.2d at 41; *Brown* v. *Heckler*, 786 F.2d 870, 872 (10th Cir. 1986); *Hansen* v. *Heckler*, 783 F.2d at 174; *Yuckert* v. *Heckler*, 774 F.2d 1365, 1369-70 (9th Cir. 1985), *cert. granted sub nom. Bowen* v. *Yuckert*, 54 U.S.L.W. 3753 (May 20, 1986) (No. 85-1409); *Salmi* v. *Secretary of Health and Human Services*, 774 F.2d 685, 691-92 (6th Cir. 1985); *Johnson* v. *Heckler*, 769 F.2d at 1209-13; *Stone* v. *Heckler*, 752 F.2d 1099, 1101 (5th Cir. 1985); *Evans* v. *Heckler*, 734 F.2d 1012, 1014 (4th Cir. 1984); *Brady* v. *Heckler*, 724 F.2d 914, 920 (11th Cir. 1984). The only issue on which the courts of appeals are divided is the relatively minor remedial question whether to insist that SSA construe and apply the severity regulation narrowly in a *de minimis* manner or strike the regulation down, as the court below did, thereby allowing the Secretary to draft a permissible narrow regulation. *Compare Brown* v. *Heckler*, 786 F.2d at 872 ("the only practical way to ensure that the Secretary follows the requirements of the Act is to invalidate the [severity regulation]"), *with Stone* v. *Heckler*, 752 F.2d at 1106 ("we will in the future assume that the ALJ and the Appeals Council have applied an incorrect standard to the severity requirement unless the correct standard is set forth by reference to this opinion, or another of the same effect . . . that [a *de minimis*] construction . . . is used.").

Secretary of Health and Human Services, 774 F.2d at 691-92; *Stone* v. *Heckler*, 752 F.2d at 1101; *Brady* v. *Heckler*, 724 F.2d at 920.[7]

II.

The Secretary's Instructions To His Staff Demonstrate That The Secretary Did Not Implement The Severity Regulation As A *De Minimis* Standard

The Secretary's representation to this Court that he has consistently sought to implement the severity regulation as a *de minimis* screeening mechanism is belied by documents obtained in discovery in litigation over the severity regulation. These documents, show that while the Secretary publicly proclaimed that the severity regulation did not constitute a substantive modification of the former *de minimis* regulation for weeding out frivolous claims, he instructed his staff to apply the new regulation much more strictly. These instructions came in the form of quality assurance returns to disability adjudicators, internal memoranda, internal disability evaluation manuals, internal rulings, "refresher" training courses for administrative law judges and administrative law judge decisions reversed on own motion review by the Appeals Council. A consistent theme throughout these materials is that a disability claimant may be denied benefits on the ground that his impairments are "not severe" even though a medical vocational evaluation might show, or in fact shows, that he is disabled.

7 In so interpreting the severity regulation, these courts have held the Secretary to his public statement in 1978 that the regulation was not intended to alter the standards for determining disability. *See* 43 Fed. Reg. 55358 (Nov. 28, 1978). As amici show below, this public statement of intent was not reflected in internal instructions. Indeed, the Secretary attempted to obtain judicial approval of his stricter severity standard before the Fifth and Sixth Circuits. *See Salmi* v. *Secretary of Health and Human Services*, 774 F.2d at 690; *Stone* v. *Heckler*, 752 F.2d at 1103. Amici therefore agree with the Third Circuit's conclusion in *Wilson* v. *Secretary of Health and Human Services*, 796 F.2d at 41, that in light of the history of the severity regulation and the statistical evidence regarding its application, the better remedial course is to strike down the regulation and leave the Secretary to draft a new acceptable regulation.

A. Quality Assurance Returns

The Secretary began enforcing the severity regulation through internal quality assurance returns two years prior to the regulation's official publication. As one court has observed, the significance of such returns "can hardly be overstated." *City of New York* v. *Heckler*, 578 F. Supp. 1109, 1114 (E.D.N.Y. 1984), *aff'd*, 742 F.2d 729 (2d Cir. 1985), *aff'd sub nom. Bowen* v. *City of New York*, 54 U.S.L.W. 4536 (U.S. June 2, 1986). Such returns "function much like remands do in the court system, and create 'precedents' for determining future cases." *Id.* After being analyzed by the State agency, the returns are "used extensively for the preparation of both training and informational materials." *Id.* They therefore serve as the "best sources of guidance" in determining the standards for disability evaluations. *Id.*

When the Secretary began returning disability determinations under his not yet published severity regulation, numerous state agencies protested that the returns indicated a changed policy that had not yet been incorporated into the regulations.[8] In one such letter, the Director of the New York Bureau of Disability Determinations observed that the "ever increasing returns" suggesting a denial on medical grounds alone appeared to be linked to the Secretary's proposed regulations introducing the term "not severe", and demonstrated that the new language was not merely a technical clarification.[9] In response to this and other protests, Robert Bynum, Associate Commissioner for the Office of Program Operations of the Social Security Administration, sent a memorandum to all Regional Commissioners informing them that the upcoming "not severe" regulation would "clarify" the heightened standard for disallowing disability claims.

8 These documents are included at pages 275-319 of the Joint Appendix in *Bowen* v. *Dixon*, No. 86-2, which has been lodged with this Court. [Hereinafter *Dixon* App.]

9 *Dixon* App. 300.

Copies of quality assurance returns obtained during discovery in *Smith* v. *Bowen*, Civ. No. S-83-1609 (E.D. Cal.) show that the Secretary did not intend that the severity regulation be applied as a *de minimis* screening device.[10] In one California case, for example, the claimant was a 63 year-old woman who had worked as a registered nurse. The claimant was injured in a gardening accident in 1982 and lost four fingers on her right hand. The State agency found that the claimant was disabled based on an evaluation of medical and vocational factors. The quality assurance reviewer reversed this determination and instructed the State to deny the claim as not severe. Ex. 17.[11]

This case illustrates how the Secretary instructed states to apply the severity regulation as more than a *de minimis* requirement. As a registered nurse, the claimant could not perform her past employment because she was no longer capable of substantial lifting or performing duties that require bilateral manual dexterity, handling, or fingering.[12] Turning to the question of other work, the State agency concluded that a sixty-three year old woman who had lost the use of four fingers on her right hand would not be able to adjust to other work that is available in significant numbers in the national economy. The quality reviewers did not question this evaluation, but instead issued the summary verdict that the impairment was not severe.

10 These case returns were obtained during discovery and submitted to the district court. *See* Exhibits Filed With Opposition to Motion to Vacate, *Smith* v. *Bowen*, Civ. No. S-83-1609 (E.D. Cal.) [hereinafter Ex.]. Copies of the returns have been lodged with the Court.

11 The reviewer conceded that the inflammation from the injury was severe, but concluded that this would not last twelve months. Loss of four fingers on the right hand was determined to be not severe.

12 The Secretary takes administrative notice of job descriptions contained in the *Dictionary of Occupational Titles* published by the Labor Department and its companion publication, *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* (1981). 20 C.F.R. § 404.1566. These publications recognize that a registered nurse must be capable of lifting up to fifty pounds with frequent lifting of up to twenty-five pounds. In addition, these occupations require a capability of handling and fingering.

In another case return produced in the *Smith* discovery, the claimant was a sixty year old lumber yard worker who suffered from degenerative arthritis of the lumbar spine, hypertension, gallstones and peptic ulcer disease. The quality assurance return noted that the consultative examiner had found tenderness over the entire spine and that X-rays indicated evidence of degenerative disease. Based on this evidence, the State was instructed that the claim must be denied as not severe. Ex. 21. This result was mandated even though the claimant's impairments undoubtedly prevented him from resuming his past heavy work as a lumber yard worker. Furthermore, denial of benefits squarely conflicts with the Secretary's own findings under the Medical Vocational Guidelines, that a sixty year old man with an eighth grade education and a history of heavy unskilled labor will not be able to engage in substantial gainful activity available in the national economy if he cannot return to heavy work. 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 203.02.

In a third case, the claimant was a sixty-four year old man who suffered from diabetes and whose right foot had been amputated. The quality reviewers ruled that amputation of the right foot is a not severe impairment because the claimant could be fitted with a prosthetic shoe. They further ruled that the claimant's diabetes was not severe. Because they concluded that the impairment was not severe, they did not assess the claimant's functional capacity or consider his advanced age and apparent lack of any experience in sedentary or light employment. Under the Secretary's Medical Vocational Guidelines a sixty-four year old person who is limited by his impairment to light or sedentary work must be found disabled, absent transferable skills or a recent high school education allowing for direct entry into skilled work. 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table 2. Nonetheless, the State was instructed to treat the impairment as "not severe" irrespective of vocational considerations. Ex. 11.

In each of these case examples, the claimant suffered from a medically determinable impairment that was objectively verifiable, caused functional restrictions, and was a direct cause of

the claimant's inability to work. To be sure, the claimants' adverse vocational profiles also contributed to their inability to work. Given a younger individual with appropriate skills and education, the inability to perform heavy labor or to perform tasks requiring bilateral manual dexterity and substantial lifting might not preclude substantial gainful activity. But, as the Secretary himself recognizes in the Medical Vocational Guidelines, functional restrictions must be considered in combination with vocational restrictions to determine whether the claimant is able to engage in substantial gainful activity. In each of these cases, the Medical Vocational Guidelines proved to be a mirage. Although the Guidelines take administrative notice, for example, that a person restricted from performing heavy work is disabled given certain vocational characteristics, the Secretary applied the severity regulation to keep claimants who were restricted by their impairments to performing less than heavy work from ever getting to the stage of the administrative process where they could hold the Secretary to his own Guidelines. In short, the severity regulation allows the Secretary to deny benefits summarily even though he has taken administrative notice that a claimant with the specified functional and vocational characteristics is disabled.

B. Internal Manual Instructions

In addition to the quality assurance reviews, the Secretary implemented the severity regulation by requiring, in internal manuals, that certain medically determinable impairments always be considered "not severe".[13] These examples of not severe impairments included some impairments that clearly

13 This list was originally contained in the Disability Insurance State Manual, was expanded in the Program Operations Manual System and was eventually issued as Social Security Ruling ("SSR") 82-55. SSR 82-55 was "obsoleted" in 1985 because it conflicts with the statutory requirement to consider the combined effect of impairments. SSR 85-III-II (April 1985). However, the Secretary has never renounced the case examples contained in SSR 82-55. In fact, recent internal instructions resurrect some of those examples. *See* Program Circular No. 12-85-OD, dated January 14, 1986, a copy of which has been lodged with the Court.

exceeded a *de minimis* test. One example was "osteoarthritis corroborated by X-ray findings, with symptoms of pain and stiffness of lumbar or cervical spine or major joints and minimal abnormal findings on physical examination." One SSA regional commissioner commented that this degree of impairment would preclude heavy work.[14] Thus the example was inconsistent with the suggestion that the severity regulation screens out only non-meritorious claims. Similarly, the list of "not severe" impairments included a colostomy with proper functioning of the stoma, even though most surgeons would not permit a return to heavy work following such an operation.[15] Indeed, when the listings of "not severe" impairments were added to the instructional manuals for state disability adjudicators, the Office of Hearings and Appeals formally commented that inclusion of the "not severe" examples would lead to inconsistent adjudications, since the Appeals Council at that time continued to be of the view that no independent severity regulation had ever been properly promulgated, and that, consequently, the pre-existing slightness standard should be applied.[16] Rather than withdrawing the examples, the Secretary issued the same instructions as Social Security Ruling 82-55, so they would be binding on the Office of Hearings and Appeals. The ruling was made effective as of August, 1980.

The Secretary provided further instructions on application of the severity regulation through "refresher" courses for administrative law judges. These courses gave examples of claimants who should be denied as having "not severe" impair-

14 *See* Memorandum from the Regional Commissioner of San Francisco to the Associate Commissioner for Operational Policy and Procedure, dated December 1, 1980, *Dixon* App. 690.

15 *See* Memorandum from Martha McSteen, Regional Commissioner Dallas Region to Associate Commissioner for Operational Policy and Procedure, dated December 10, 1980, *Dixon* App. 700.

16 Memorandum from the Office of Policy and Procedures, Office of Hearings and Appeals, to Office of Disability Programs, Office of Operational Policy and Procedure, dated January 2, 1981, *Dixon* App. 728.

ments. One example is of a woman with a tortuous aorta and documented narrowing of the two coronary arteries.[17] She had been diagnosed as having atypical angina and hypertensive cardiovascular disease with coronary insufficiency. SSA's own consultative physician stated that she should not lift over 25 pounds. On these facts, the "refresher" course stated that the claim should be denied as not severe. Once again, this result squarely conflicts with the Medical Vocational Guidelines which take administrative notice that a person with the described limitations and an adverse vocational profile cannot engage in substantial gainful activity and must be found disabled. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 202.01, 202.02, 202.04, 202.06, 202.09.

III.

Evidence From Jurisdictions In Which The Secretary's Past Policies Are Enjoined Demonstrate That The Severity Regulation Was Not Applied As A *De Minimis* Standard

The Secretary's insistence that the severity standard in effect during the period when respondent's claim was adjudicated was a *de minimis* standard is further contradicted by the experience of class members in *Johnson*, *Smith*, and *Dixon*. In each of these cases, the Secretary chose to comply with the district court's order by issuing instructions barring the use of any severity step.[18] Under these instructions, new cases are being adjudicated without a step two standard. In addition, class members whose claims had been denied at step two were given an opportunity to prove their eligibility through completion of the sequential evaluation.

The experience of the named plaintiffs in these class actions shows that the Secretary has used the severity regulation to

17 *See Dixon* App. 760-62.

18 The Secretary's decision to omit step two in these cases presumably reflected his recognition that he did not have any guidelines for a *de minimis* standard. *See Johnson* v. *Heckler*, 593 F. Supp. at 379 (expressly endorsing application of a *de minimis* test).

deny meritorious claims. Joanne Lockett, one of the named plaintiffs in *Dixon*, was a telephone operator and supervisor prior to suffering a stroke which caused her considerable brain damage. At the initial hearing in her case, the administrative law judge ruled that Lockett was disabled for fourteen months following her stroke but that her impairments were "not severe" as soon as she attempted to learn work skills in a sheltered workshop for disabled persons. The administrative law judge concluded that Lockett could not return to her prior work but stated that this was "not material" since her impairment was "not severe." Accordingly, the administrative law judge did not consider other work Lockett might be able to perform.[19] When Lockett's case was readjudicated under the *Dixon* injunction, the administrative law judge accepted evidence from a vocational counselor which showed that Lockett's impairments prevented her from working. Accordingly, she is now receiving disability benefits.

Gerald Maloney, a named plaintiff in *McDonald*, was also found disabled following a complete evaluation of his disability. Maloney is a sixty year old man who worked for twenty-seven years as an operating room attendant following service in the Army and the Marines.[20] Maloney injured his back and neck while protecting a 175 pound patient from a fall. Despite careful adherence to the therapy prescribed by his doctor, Maloney was unable to return to his former job. Tr. 58. Three months following his accident, Maloney attempted to return to work at the hospital as a mail room clerk. After two weeks, this work also proved to be too strenuous and caused Maloney intense pain. Tr. 60. Maloney's physician reported that X-rays showed "considerable degenerative changes throughout the cervical spine" and that Maloney is "unable to lift more than a few pounds and then only to a level of mid-chest." Tr. 154. At the initial hearing on Maloney's claim, his impairments were

19 *Dixon* App. 76. *See also Dixon* v. *Heckler*, 589 F. Supp. at 1506.

20 *See* Administrative Transcript, filed in *McDonald* v. *Bowen*, No. 84-2109 (D. Mass.) [hereinafter Tr.] at 52, 59.

dismissed as "not severe." Following remand under the *McDonald* order, the administrative law judge concluded that Maloney was "clearly unable to perform his past job as an operating room attendant which required lifting in excess of one hundred pounds." The administrative law judge further found that Maloney was limited to performing sedentary work. Considering Maloney's functional limitations, and his age, education, and work experience, the administrative law judge concluded that Maloney was disabled. This conclusion followed the Secretary's Medical Vocational Guidelines that recognize that a person with Maloney's medical and vocational characteristics and a history of heavy labor, will not be able to adjust to new work that exists in substantial numbers in the national economy.[21]

Statistical evidence from jurisdictions currently enjoined from continuing the Secretary's past policies show that these named plaintiffs' experiences are typical. If, as the Secretary asserts, the severity regulation operated solely to weed out groundless claims, one would expect no change in the percentage of persons found disabled under these injunctions. If, however, the severity regulation operated to deny benefits to eligible claimants, one would expect a greater percentage of persons to be found disabled following consideration of their vocational characteristics.

The most detailed statistics available are from the *Johnson* case, which enjoins use of more than a *de minimis* standard in the State of Illinois. These statistics show that the rate at which claimants are found disabled has risen substantially since the *Johnson* order was put into effect.[22] Prior to issuance of the

21 *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, R. 201.12. A copy of the Administrative Law Judge's decision on remand has been lodged with the court.

22 These statistics are derived from the Secretary's own data, produced in accordance with court ordered compliance reports and discovery. The pre-injunction figures cover the period from January 1984 through November 15, 1985. The post-injunction statistics cover November 15, 1985 through May, 1986.

injunction, 34.3 percent of claimants were found disabled at the initial level. After the injunction, this percentage rose to 52 percent. Similarly, the percentage of claimants allowed at the reconsideration level rose from 14.8 percent to 34.1 percent.

Statistics regarding class members whose cases were readjudicated also provide powerful evidence that the severity regulation was not applied in a *de minimis* manner. Under the injunctions in *Smith* and *Dixon*, class members who had previously been denied as not severe were permitted to obtain a re-evaluation of their disability at the stage of the administrative process where their cases had been decided, or were pending. The statistics on re-evaluations at the administrative law judge level showed that over forty percent of these class members were found disabled even though their claims had previously been denied as not severe.[23] Similar statistics from the *Johnson* class show that 31.2 percent of the claimants re-evaluated at the reconsideration stage were found to be disabled.[24]

23 These statistics are derived from compliance reports prepared by the Secretary pursuant to the orders in *Smith* and *Dixon*. In *Smith*, 44 percent of those class members were found disabled. In *Dixon*, 41 percent were found disabled.

24 In *Smith* and *Dixon*, the percentage of class members found disabled at the reconsideration levels were lower. This appears to result from improper instructions that carried forward the policies enjoined by the district court orders. These instructions were brought to the Secretary's attention in *Dixon*. Proceedings to remedy these instructions are in abeyance pending further discovery.

IV.

Whether The Secretary Is Now Applying A *De Minimis* Severity Standard Is Not Relevant To The Correctness Of The Court Of Appeals' Decision And Should Not Be Addressed By This Court In The Absence Of A Factual Record.

After the court of appeals' decision in this case, the Secretary published two new rulings, SSR 85-28 and SSR 86-8, that the Secretary describes as clarifying the circumstances under which an impairment should be found "not severe."[25] Neither of these rulings was applied to respondent's case. Indeed, SSR 85-28 explains that it is meant to ensure that the Secretary's policy is consistent with "circuit court decisions that have taken issue with the Secretary's *previously stated definition* of 'not severe' impairment." (Emphasis added). It was the previously stated definition—one that every court of appeals has found to have been applied to deny benefits to eligible claimants—which was applied in respondent's case.

Should this Court find these new rulings relevant to the evaluation of the Secretary's regulation, it should not undertake the task of construing them and evaluating the severity regulation in light of that construction. Such review by this Court is inappropriate because the lower court did not pass on the new rulings and because they raise important factual questions, which should not be considered in the first instance by this Court. *See Youakim* v. *Miller*, 425 U.S. 231, 235-36 (1976); *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670, 672-73 (1967).

First, the new rulings do not clearly abandon the Secretary's past practices. Although SSR 85-28 states that it endorses the approach of the *Brady* and *Stone* courts,[26] and employs lan-

25 A draft version of SSR 85-28 was presented to the court of appeals. At the time of the decision below, however, the ruling had not been published. In fact, it was modified prior to its publication.

26 The ruling also purports to follow *Baeder*. This assertion "boldly lifts the Third Circuit's language and quotes it wholly out of context." *Wilson* v. *Heckler*, 622 F.Supp. at 653. *See Bailey* v. *Heckler*, Slip op. at 6-7.

guage similar to that in those decisions, it also asserts that it is merely restating the policy that has always been in place. Thus, it can be read as ratifying the very practices that the circuit courts of appeals have found to conflict with the Act.[27]

Furthermore, the rulings do not clearly abandon the Secretary's prior practice of refusing to consider past work. Although one court has interpreted the rulings as adopting the rule of all twelve circuits that a claimant makes out a *prima facie* case of disability by showing an inability to return to past work, *McDonald* v. *Secretary of Health and Human Services*, 795 F.2d at 1125, the Secretary's brief strongly suggests that the Secretary has no intention of applying the new rulings in this *de minimis* manner. Pet. Br. 29 n.15. Indeed, the Secretary states that he will only consider inability to return to past work when that work was "unique." *See Hansen* v. *Heckler*, 783 F.2d at 175.

In addition, the new rulings raise serious questions about whether the Secretary is abiding by his statutory obligation to follow rulemaking procedures on matters relating to disability. *See* 42 U.S.C. § 421(k)(2); *Pulido* v. *Heckler*, 758 F.2d 503, 506 (10th Cir. 1985).[28] These questions were not addressed by the court below because no new ruling had in fact been promulgated at the time it issued its decision.

27 Furthermore, 86-8 does not reiterate the *Brady de minimis* formulation in describing the severity regulation. Indeed, SSR 86-8 suggests that it might not even be necessary to consider vocational factors in the negative sense that no one with the impairment would be found disabled irrespective of age, education and work experience.

28 As this Court noted in *Heckler* v. *Campbell*, 461 U.S. at 470, formal rulemaking provides an essential procedural safeguard when the Secretary seeks to dispense with individualized adjudication. The Secretary has never submitted his assumptions about the availability of jobs for persons with "not severe" impairments to this process. He suggests that a non-expert can simply guess on a case-by-case basis whether an impairment would prevent any one from engaging in substantial gainful activity, irrespective of age, education, and work experience. Indeed, when the Secretary first considered revising his severity policies, his own workgroup recommended that any revisions be issued through properly promulgated regulations. *See Dixon* App. 622-29.

In light of the many factual and legal issues raised by the new rulings, this Court should not seek to review the new rulings in the first instance. Instead, this task should be left to the lower courts which are in the best position to evaluate all of these issues on the basis of a factual record.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the judgment below remanding respondent's case for a new hearing under an eligibility standard that imposes no more than a *de minimis* threshold test.

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